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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEENDERT NIX et al., Plaintiffs and Respondents, v. CABCO YELLOW, INC., et al., Defendant and Appellant.	G056110 (Super. Ct. No. 30-2017-000928481) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Marron Lawyers, Paul J. Marron, Steven C. Rice, Paul B. Arenas, and Lyle B. Trainer for Defendant and Appellant.

Krissman & Silver, Jarod A. Krissman and Donna Silver; Roston Law Group and Matthew E. Roston for Plaintiffs and Respondents.

This case arises from an employment dispute between two taxi cab drivers, Leendert Nix and Abdiqadir Hassan (collectively referred to as Respondents unless the context dictates otherwise) and Cabco Yellow, Inc., doing business as California Yellow Cab Company (CYC). Respondents signed taxicab lease agreements (agreements) in order to lease taxis from CYC. After Respondents filed their employment claims against CYC in the trial court, CYC filed a motion to compel arbitration. CYC asserted the agreements' delegation clauses provided that an arbitrator, not the court, should decide the issue of arbitrability and that the agreements contained binding arbitration provisions requiring arbitration of all disputes between the parties. The trial court denied CYC's motion to compel arbitration because it determined the agreements contained unenforceable delegation clauses and were both substantively and procedurally unconscionable. We find no error and affirm the order.

FACTS

I. *Background Facts*

CYC leases vehicles to taxicab operators as part of its operations. People who operate the leased taxicabs are lease drivers. Those lease drivers enter into taxicab lease agreements with CYC. Nix and Hassan are both lease drivers who signed agreements to lease taxicabs from CYC.

CYC stated it was company practice to ask the drivers to sign revised agreements every three to five years. It was also CYC's practice to provide drivers with copies of the agreements, give them two to three days to read and review the provisions in the agreements, and answer any questions the drivers had concerning the agreements.

Nix started working for CYC in 2001. He signed the operative agreement in 2012. Nix submitted a declaration stating he was told the agreement had to be signed on the spot upon being summoned to CYC's office, or else he could not continue to drive for CYC, '"If you don't sign it, you don't have a cab and you can't go back to work." Nix also said he was never offered, and has never received, a copy of any agreement.

Hassan worked for CYC from 2004 to March 2016. Like Nix, Hassan signed the operative agreement in 2012. Hassan was told he had to come into the office to sign one, or else he would not be able to work. Hassan also stated he was never given a copy of the agreement.

II. *Pertinent Contract Language*

Nix entered into the operative agreement with CYC on September 13, 2012 (Nix agreement). Under section 8.5 of the Nix agreement, "Any and all disputes, controversies or claims between me, Vehicle Owner and/or CYC in any way relating to, or arising from this Agreement (including its validity, interpretation, enforceability or breach as well as the enforceability of this [s]ection 8.5) or my activities related to this Agreement including but not limited to my classification as an independent contractor pursuant to this Agreement shall be subject to arbitration in Orange County, California administered by the Judicial Arbitration and Mediation Services Inc. (JAMS) in accordance with JAMS Comprehensive or Streamlined Arbitration Rules (with the choice of rules determined by the arbitrator according to JAMS rules or guidelines)." Section 8.5, subdivision (c), applies mandatory arbitration to any class action or Private Attorney General Act (PAGA) claims against CYC. Section 8.5, subdivision (g), provides that "[t]he parties shall bear their own costs, including, without limitation, attorneys' fees, and shall each pay, one-half (1/2) by me, and one-half (1/2) by Vehicle Owner and/or CYC, of all arbitration fees and costs including those of the arbitrator; provided, however, in return for my agreeing to the provisions of this Section 8.5, Vehicle Owner and/or shall contribute a total of $250.00 towards my portion of such fees and costs. Such fees shall be timely paid."

Hassan entered into the operative agreement with CYC on November 23, 2012 (Hassan agreement). Section 8.5 of the Hassan agreement provides as follows: "Any controversy, claim or dispute between me and the Vehicle Owner or CYC in any way relating to, or arising out of, this Agreement (including its validity, interpretation,

enforceability or breach) or the Covered Taxicab or related activities (regardless of the legal theory involved, whether contractual, tort or statutory) shall be adjudicated in an arbitration administered by the Judicial Arbitration and Mediation Services, Inc. ("JAMS") in accordance with its applicable rules, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

Section 8.3 of both agreements contain the following provision: "Governing Law; Jurisdiction. This Agreement has been negotiated and entered into in the State of California, concerns a California business and questions with respect to this Agreement and the rights and liabilities of the parties will be governed by the laws of that state, regardless of choice of law provisions of California or any other jurisdiction." They also both contain a severability provision in section 8.4, which provides: "If any part of this Agreement is declared by any court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect and shall not be affected."

Section 8.6 of both agreements provides, "CYC shall be entitled to equitable relief by way of injunction or otherwise (without any requirement to post bond) in addition to all of the remedies available to it at law. The rights, remedies and benefits of CYC herein expressly specified shall be cumulative and not exclusive of any other rights, remedies or benefits which CYC may have under this Agreement or . . . at law, in equity, by statute or otherwise. The exercise of one right or remedy shall not affect CYC's other rights, remedies or benefits."

III. *Underlying Complaint and Procedural History*

In June 2017, Nix and Hassan filed a lawsuit in Orange County Superior Court against CYC asserting they were employees, not independent contractors, and alleging various Labor Code violations. CYC moved to compel arbitration under the Federal Arbitration Act (FAA). The trial court denied CYC's motion to compel arbitration because it concluded the delegation clause was not clear and unmistakable and

the arbitration provisions were unenforceable as procedurally and substantively unconscionable.

DISCUSSION

CYC contends the trial court erred in denying its motion to compel arbitration. CYC argues the delegation clause is clear and unmistakable and the issue of arbitrability should have been decided by the arbitrator, not the court. CYC also claims even if the delegation clause is not enforceable, the arbitration clauses are not procedurally or substantively unconscionable and therefore enforceable.

The trial court determined the delegation clause was unclear and the issue of arbitrability was properly decided by the court. The court also appropriately determined the agreements were procedurally and substantively unconscionable. We find no error.

In assessing the trial court's denial of a motion to compel arbitration, we review the agreements de novo to determine whether they are legally enforceable, applying general principles of California law.[1] (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106.) We review the court's factual determinations for substantial evidence. (*Ibid.*) We review a court's determination on severability for abuse of discretion. (*Armendariz, supra,* 24 Cal.4th at p. 124.)

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[1] CYC claims the FAA applies to this action, which Respondents dispute. (9 U.S.C. § 1, *et seq.*) The trial court demurred on the issue, stating, "The [c]ourt need not decide the disputed question whether federal or state law applies. Even assuming that the FAA applies and that Labor Code 229 is preempted, the [c]ourt finds that the delegation clause is unenforceable, and that the arbitration agreements are both procedurally and substantively unconscionable. Unconscionability constitutes a defense to enforcement under both the FAA and California law. (9 U.S.C [§] 2; [Civil Code §] 1670.5, [subdivision] (a).)" We agree. Because the parties have predominately briefed the issues applying California law, we do the same. We express no opinion as to the applicability of the FAA to this action, as the issue was not briefed or presented on appeal.

I. *The Delegation Clauses*

"Parties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement. [Citation.] They 'can agree to arbitrate almost any dispute—even a dispute over whether the underlying dispute is subject to arbitration.' [Citation.] [¶] There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability. [Citations.]" (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 241-242.) "The law presumes that a delegation to an arbitrator of enforceability issues is ineffective absent clear and unmistakable evidence that the parties intended such a delegation." [Citations.] (*Id.* at p. 242.)

CYC contends the following language constitutes the delegation clause of the Nix agreement: "**Any and all disputes, controversies, or claims** between me, Vehicle Owner, and/or CYC **in any way relating to or arising from this Agreement** (including its **validity**, **interpretation**, **enforceability** or breach as well as the **enforceability** of this Section 8.5) or my activities related to this Agreement . . . shall be subject to arbitration . . . . " Similarly, in the Hassan agreement, the delegation clause provides, "**Any controversy, claim or dispute** between me and the Vehicle Owner or CYC, **in any way relating to, or arising out of this Agreement** (**including its validity, interpretation, enforceability** or breach) or the Covered Taxicab or related activities . . . shall be adjudicated in an arbitration . . . . "

CYC also argues the incorporation of JAMS rules further evidences their intent to delegate disputes regarding enforceability of the agreements to the arbitrator. Each agreement requires that arbitration shall be held in accordance with JAMS rules. Under JAMS rules, the arbitrator is delegated the exclusive authority to determine jurisdiction and arbitrability. The agreements contained a severability provision in

section 8.4, which provides: "If any part of this Agreement is declared by any court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect and shall not be affected."

CYC relies on *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880 (*Aanderud*), for the proposition that a severability clause not contained in the same sub-section as the arbitration agreement cannot be considered by the trial court when deciding whether the delegation clause is clear and unmistakable. *Aanderud*, however, does not state such a broad rule. There, the "arbitration provision [] expressly state[d] that any disputes, which include those over the scope and applicability of the arbitration provision, [would] be resolved through binding arbitration except those within small claims court jurisdiction." (*Id*. at p. 894.) The agreement at issue also contained a severability clause providing for severance of any provision of the agreement if it was '"held to be invalid, prohibited, or otherwise unenforceable by an arbitrator or court of competent jurisdiction."' (*Ibid*.) The *Aanderud* court went on to explain, "Since arbitration is not at issue in a small claims court action, the small claims court can only find unenforceable provisions of the [agreement at issue] other than the arbitration provision. Thus, when the severability clause provides for severance of any provision . . . if it is 'held to be invalid, prohibited, or otherwise unenforceable by an arbitrator or court of competent jurisdiction,' the court being referred to is the small claims court, which is not enpowered to determine the scope or applicability of the arbitration provision." (*Ibid*., fn. Omitted.) Here, unlike *Aanderud*, the delegation clause and the severability clause created an actual ambiguity in the delegation of authority to decide the arbitrability question because there was no provision for small claims court jurisdiction.

This case is more akin to the facts of *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554 (*Parada*). There, like here, "'although one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision

unenforceable.' [Citation.]" (*Id*. at p. 1566; see also *Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249.) Read together, the arbitration provisions and the severability provisions of the agreements created an ambiguity as to who may determine validity, interpretation, and enforcement of the arbitration agreement, and given this ambiguity, the delegation clauses did not clearly and unmistakably reserve to the arbitrator the issue of arbitrability. We find no error with the trial court's decision as to the delegation clause and it was therefore proper for the court to determine arbitrability.

II. *The Doctrine of Unconscionability*

Civil Code section 1670.5, subdivision (a), states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."[2] Both procedural and substantive unconscionability must be present for a court to refuse to enforce a contract provision under the doctrine of unconscionability. "But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra,* 24 Cal.4th at p. 114.)

"The procedural element of the unconscionability analysis concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citations.] The element focuses on oppression or surprise. [Citation.]

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[2] All further statutory references are to the Civil Code, unless otherwise indicated.

'Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.' [Citation.] Surprise is defined as "'the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'" [Citations.]" (*Gatton v. T-Mobile USA, Inc*. (2007) 152 Cal.App.4th 571, 581, fn. omitted (*Gatton*).)

"A contract of adhesion is '"""imposed and drafted by the party of superior bargaining strength"""" and '"""relegates to the subscribing party only the opportunity to adhere to the contract or reject it."""" [Citation.]" (*Gatton, supra,* 152 Cal.App.4th at p. 582.) A contract of adhesion is "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Armendariz, supra,* 24 Cal.4th at p. 113.) A conclusion that an agreement is one of adhesion "heralds the beginning, not the end, of our inquiry into its enforceability." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319.) "A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression. [Citation.]" (*Parada, supra,* 176 Cal.App.4th at p. 1571.)

The substantive unconscionability inquiry focuses on "the effects of the contractual terms and whether they are overly harsh or one-sided. [Citations.]" (*Flores v. Transamerica HomeFirst, Inc*. (2001) 93 Cal.App.4th 846, 853.) "A contractual provision is not substantively unconscionable simply because it provides one side a greater benefit. The party with the greater bargaining power is permitted to require contractual provisions that provide it with additional protections if there is a legitimate commercial need for those protections, but the stronger party may not require additional protections merely to maximize its advantage over the weaker party. [Citations.]" (*Carbajal v. CWPSC, Inc*. (2016) 245 Cal.App.4th 227, 248 (*Carbajal*).)

In *Armendariz*, our Supreme Court recognized that "certain statutory rights can be waived" and cited section 3513 which states '"[a]nyone may waive the advantage of a law intended solely for his benefit." (*Armendariz, supra,* 24 Cal.4th 83, 100; § 3513.) The court went on to hold that arbitration agreements that encompass statutory rights are subject to particular scrutiny. (*Id*.) It therefore established five minimum requirements for the lawful arbitration of nonwaivable statutory civil rights pursuant to a mandatory employment arbitration agreement. (*Armendariz, supra,* 24 Cal.4th 83, 102.) The court held that an arbitration agreement is lawful if it: '"(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Ibid*.) "Elimination of or interference with any of these basic provisions makes an arbitration agreement substantively unconscionable." (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1248.)

III. *Procedural Unconscionability*

The trial court determined, "the arbitration agreements are procedurally unconscionable adhesion contracts, as they were provided to plaintiffs on a 'take it or leave it basis,' as a condition of employment, and with no opportunity to negotiate their terms. [] Plaintiffs were also not provided with the applicable arbitration rules." CYC contends this was error. It argues the agreements were not presented on a "take it or leave it basis" or as conditions of employment. CYC further states copies of the agreements were provided to Respondents, Respondents were given two to three days to review and sign the agreements, Respondents were given an opportunity to ask questions about the agreements, Respondents could request changes to the agreements, and there was no evidence of surprise or sharp practices by CYC. Respondents' evidence

contradicts CYC's claims. We agree the agreements presented a low to medium degree of procedural unconscionability.

Respondents' evidence showed, which the trial court credited, they had to sign the agreements on the spot at CYC's office or stop driving. Respondents were forced to sign under time and economic pressure, lacking explanation or adequate time for review. They were never provided with copies of the agreements. Respondents also had no understanding of the arbitration process or were provided with copies of the applicable JAMS rules or told how to access them. Indeed, it is unclear exactly which set of JAMS rules would be applicable to this action. Neither Respondent could, or can, afford to pay the fees and costs associated with arbitration.

CYC asserts the trial court erred by relying on *Carbajal*, stating its failure to attach the applicable JAMS rules does not multiply the degree of procedural unconscionability. (*Carbajal*, *supra*, 245 Cal.App.4th at p. 244.) CYC contends failure to attach the arbitration rules does not weigh in favor of procedural unconscionability where there is no evidence of surprise or oppression in the applicable rules. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246 (*Baltazar*).) Here, however, CYC did not merely fail to attach the rules, the applicable rules were not even specified. This left Respondents to guess which set of JAMS rules would govern. We conclude the agreements have a low to medium level of procedural unconscionability based on their adhesive nature, the failure to specify which set of JAMS rules would apply, and the context in which they were signed.

IV. *Substantive Unconscionability*

Respondents contend the agreements are substantively unconscionable because they lack mutuality; the Nix agreement requires Nix to bear his own fees and costs; the agreements do not require a written award; the Hassan agreement unreasonably shortens the applicable limitations periods; and the agreements fail to provide for more than minimal discovery. We agree the agreements lack mutuality because they contain

one-sided provisions allowing only CYC to seek injunctive relief. Additionally, the Nix agreement's cost and fee-splitting provision and the clause prohibiting arbitration of any class action or a PAGA claim against CYC are substantively unconscionable, as is the Hassan agreement's shortened statute of limitations.

A. *Mutual Agreement to Arbitrate*

The trial court determined the agreements were substantively unconscionable because "[t]hey are not bilateral." We agree.

Although the agreements state "[a]ny controversy, claim or dispute . . . in any way relating to, or arising out of, this [a]greement" must be submitted to binding arbitration and it appears to apply to both CYC and Respondents in the same manner, section 8.6 of the agreements erodes the mutuality of this requirement. Specifically, it provides, "CYC shall be entitled to equitable relief by way of injunction or otherwise (without any requirement to post bond) in addition to all of the remedies available to it at law. The rights, remedies and benefits of CYC herein expressly specified shall be cumulative and not exclusive of any other rights, remedies or benefits which CYC may have under this Agreement or . . . at law, in equity, by statute or otherwise. The exercise of one right or remedy shall not affect CYC's other rights, remedies or benefits."

"In *Armendariz*, the court observed substantive unconscionability may manifest itself if the form of 'an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.' This is what we have here: [the employer] requires the weaker parties—its employees—to arbitrate their most common claims while choosing to litigate in the courts its own claims against its employees." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 176 [fn. omitted].)

"A contractual provision is not substantively unconscionable simply because it provides one side a greater benefit. The party with the greater bargaining power is permitted to require contractual provisions that provide it with additional protections if there is a legitimate commercial need for those protections, but the stronger

party may not require additional protections merely to maximize its advantage over the weaker party. [Citations.] 'As has been recognized "'unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for it.'"' [Citation.]" (*Carbajal, supra,* 245 Cal.App.4th at p. 248.)

"'Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on '"business realities."' . . . If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage.' [Citations.]" (*Carbajal, supra,* 245 Cal.App.4th at p. 248.) "Applying these standards, courts repeatedly have found an employer-imposed arbitration agreement to be substantively unconscionable when it requires the employee to arbitrate the claims he or she is mostly likely to bring, but allows the employer to go to court to pursue the claims it is most likely to bring. [Citations.]" (*Ibid.* [injunctive relief carve out provision substantively unconsionable].)

In *Armendariz, supra,* 24 Cal.4th 83, the California Supreme Court recognized that there could be a reasonable justification for a one-sided arbitration agreement. But it emphasized that "'unless the "business realities" that create the special need for such an advantage are explained in the contract itself . . . it must be factually established.'" (*Id.* at p. 117.) Applying these legal principles, the court in *Carbajal* held, "Here, the Agreement is substantively unconscionable on its face because it requires [the employee] to arbitrate 'any and all disputes she has with [the employer], but it authorizes [the employer] to 'obtain an injunction from a court of competent jurisdiction' to restrain [the employee] from breaching the Agreement's nondisclosure and exclusive use

provisions. [The employer] offers no justification for this blatantly one-sided provision." (*Carbajal, supra,* 245 Cal.App.4th at p. 249.)

CYC asserts since Respondents did not seek an injunction, section 8.6 of the agreements is irrelevant. Not so. The degree of unconscionability found in an arbitration agreement (evidenced, in part, by the number of unconscionable provisions it contains) is relevant to our consideration of whether an isolated provision may be erased from an otherwise enforceable arbitration agreement or whether we must invalidate the entire agreement. (*Armendariz, supra,* 24 Cal.4th at pp. 123-127.) This is because at one time CYC used its superior bargaining position to obtain a purportedly voluntary agreement by Respondents to terms from which CYC disproportionately benefitted—not whether Respondents currently assert the provisions should be enforced. (*Id*. at pp. 124-125 [rejecting argument postemployment offer to modify unlawful arbitration agreement would cure unconscionability].)

Section 8.6. gives CYC, but not Respondents, the right to seek a permanent injunction. CYC effectively gave itself special access to a civil forum, while limiting Respondents to provisional relief set forth in Code of Civil Procedure section 1281.8. Because CYC offers no business explanation to justify this one-sided provision, section 8.6 is substantively unconscionable.

B. *Fees and Costs in Nix Agreement*

The Hassan agreement is silent on the question of attorney fees, but section 8.5, subdivision (g) of the Nix agreement provides that "[t]he parties shall bear their own costs, including, without limitation, attorneys' fees, and shall each pay, one-half (1/2) by me, and one-half (1/2) by Vehicle Owner and/or CYC, of all arbitration fees and costs including those of the arbitrator; provided, however, in return for my agreeing to the provisions of this Section 8.5, Vehicle Owner and/or shall contribute a total of $250.00 towards my portion of such fees and costs. Such fees shall be timely paid." Respondents contend this provision is in violation of controlling law on arbitration fee-splitting in the

employment context. (*Carbajal, supra,* 245 Cal.App.4th at pp. 250-251; *Armendariz, supra,* 24 Cal.4th at pp. 110-111.) We agree.

Respondents have a right to reasonable attorney fees if they are prevailing parties under Labor Code section 1194. An arbitration award in the employment context must allow for recovery available in a court action and the allocation of arbitration costs should not unduly burden the party asserting the employment claims. (*Armendariz, supra,* 24 Cal.4th at p. 103; *Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1081 (*Little*).) CYC's proposal to cure this substantive unconscionability with an offer, after service of Respondents' complaint, to pay all arbitration fees and costs for Respondents' employment claims, is insufficient. (*Martinez v. Master Protection Corp*. (2004) 118 Cal.App.4th 107, 116-117.) The provision in the Nix agreement limiting the recovery of attorney fees and arbitration costs is unenforceable. (*Armendariz, supra,* 24 Cal.4th at p. 124.)

C. *Requirement of a Written Award*

The trial court held that the arbitration provisions here are substantively unconscionable because they "do not require a written award." We disagree.

The agreements do not expressly address whether the arbitration award must be in writing. They do, however, incorporate JAMS rules. While the agreements fail to specify precisely which JAMS rules apply, a review of the employment, streamlined, and comprehensive JAMS rules demonstrate an award is required to be made in writing. There is nothing in either arbitration provision that otherwise negates JAMS rules requiring a written award.

D. *Applicable Statute of Limitations to Hassan Agreement*

An arbitral limitations period shorter than the applicable statute of limitations is not per se unconscionable, but is a factor in determining whether an arbitration contract is substantively unconscionable. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1283 fn. 12.) Where an employee claims discrimination,

elements of essential fairness must permit the employee to vindicate statutory rights. (*Armendariz, supra*, 24 Cal.4th at pp. 90-91.)

"While parties to an arbitration agreement may agree to shorten the applicable limitations period for bringing an action, a shortened limitations period must be reasonable. [Citation.] "'A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained.'" [Citation.]" (*Baxter v. Genworth North America Corp*. (2017) 16 Cal.App.5th 713, 731.)

The trial court determined the Hassan agreement "requires the employee to bring all claims within one year; however, with the exception of statutory penalties, the statute of limitations for plaintiff's claims generally is three years" and "[a] shortened limitations period 'is unconscionable and insufficient to protect its employees' right to vindicate their statutory rights.'" We agree.

The Hassan agreement compels arbitration of employment claims in a shortened timeframe, depriving Hassan of significant remedies he would normally enjoy. (*Armendariz, supra*, 24 Cal.4th at pp. 103-104.) We determine this shortened limitations period as to the Hassan agreement and the statutory claims at issue substantively unconscionable.

E. *Discovery Provision*

Respondents contend the JAMS rules are unconscionable because they do not provide for more than minimal discovery, as required under *Armendariz*. (*Armendariz, supra*, 24 Cal.4th at p. 102.) Not so.

The Nix agreement does not expressly provide for discovery and the Hassan agreement specifies a limit of 10 interrogatories and 15 document requests per party. The agreements also provide for discovery through the incorporation of JAMS rules, although, as discussed above, it is unclear which set of rules applies. In any event,

a review of the employment, streamlined, and comprehensive JAMS rules shows all provide for some level of discovery.

"[A]rbitration is meant to be a streamlined procedure. Limitations on discovery, including the number of depositions, is one of the ways streamlining is achieved." (*Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975, 983 (*Dotson*).) Here, the discovery limitations are mutual. The agreements provide for more than minimal discovery and are not unconscionable on that basis.

F. *The PAGA Provision in Nix Agreement*

Section 8.5, subdivision (c), of the Nix agreement waives class action rights and bars him from bringing or joining a representative action such as one under the PAGA. He contends the provision is further evidence of the agreement's substantive unconscionability. We agree.

Our Supreme Court has held that "where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384.) CYC asks us to ignore this provision because Respondents did not bring a PAGA claim. As discussed above, however, the degree of unconscionability found in an arbitration agreement is judged from the time of contracting. (*Armendariz*, *supra*, 24 Cal.4th at pp. 125.) We find the provision prohibiting class action and the PAGA claims is more evidence of substantive unconscionability. (See *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498 [upholding trial court's determination "PAGA waiver was unconscionable, and that the PAGA waiver and class action waiver together rendered the entire arbitration agreement unenforceable"].)

V. Severability

The trial court determined the agreements contained "numerous substantively unconscionable terms" and refused CYC's request to sever those terms and enforce the rest of the arbitration agreements. We agree.

Civil Code section 1670.5, subdivision (a), gives trial courts discretion to sever unconscionable provisions from a contract: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (*Ibid*.) Where the arbitration agreement contains multiple unlawful provisions and there is no single provision the court could strike or restrict to remove the unconscionable taint, severance is inappropriate. (*Armendariz, supra,* 24 Cal.4th at pp. 124-125.)

Each of the agreements at issue contained multiple unenforceable provisions. The court could not have saved the agreements by striking those provisions. We find no abuse of discretion.

DISPOSITION

The trial court's order denying CYC's motion to compel arbitration is affirmed. Respondents are entitled to their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.